75-1829

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 12, AFL-CIO; TRUSTEES OF ELECTRICAL INDUSTRY VACATION FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL BENEFIT FUND; TTUSTEES OF EIGHTH DISTRICT ELECTRICAL WORKERS PENSION TRUST; and TRUSTEES OF JOINT APPRENTICESHIP AND TRAINING TRUST FUND,

Petitioners

v.

A-1 ELECTRIC SERVICE, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 12, AFL-CIO; TRUSTEES OF ELECTRICAL INDUSTRY VACATION FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL BENEFIT FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL WORKERS PENSION TRUST, and TRUSTEES OF JOINT APPRENTICESHIP AND TRAINING TRUST FUND,

Petitioners

v.

A-1 ELECTRIC SERVICE, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is attached hereto as Appendix A. The opinion and judgment of the District Court for the District of Colorado are unreported, and are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered and dated March 4, 1976. Petitioners filed a petition for rehearing in the Court of Appeals on March 17, 1976. The Court of Appeals denied said petition on March 29, 1976. The jurisdiction of this court is invoked under 28 U.S.C. 1254(l).

QUESTION PRESENTED

What damages are recoverable by a labor union for checked off dues, and by the trustees of various fringe benefit funds, for fringe benefits under collective bargaining agreements when the employer simply disavows the agreements without giving the written notice of termination which the agreements require?

STATUTES INVOLVED

Labor Management Relations Act:

"Sec. 301.(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (61 Stat. 156, 29 U.S.C. 185(a)).

National Labor Relations Act:

"Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of

employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:***." (61 Stat. 142, 29 U.S.C. 158(d)).

STATEMENT OF THE CASE

The action was filed by petitioners, plaintiffs below, in the United States District Court for the District of Colorado. Plaintiff International Brotherhood of Electrical Workers, Local No. 12, AFL-CIO, is a labor organization representing employees in the building construction industry, which is an industry affecting commerce, and has its principal offices at Pueblo, Colorado, in the District of Colorado. Federal jurisdiction in the court of first instance is conferred by sections 301(a) and (c) of the Labor-Management Relations Act, (61 Stat. 156-7, 29 U.S.C. 185(a)(c)).

In this statement and in the remainder of this petition we will refer to the local union petitioner as the "union", to the other petitioners as the "fund trustees", and to the respondent as the "company".

In 1972, the company signed and delivered to the union a "letter of assent" which recited that the company had examined a copy of the labor agreement between Southern Colorado Chapter, NECA, Inc., and the union, that the company agreed to comply with all of the terms and conditions of employment contained in the agreement and all approved amendments thereto, and that the company designated Southern Colorado Chapter, NECA, as its collective bargaining representative for all matters contained in or pertaining to the agreement, which authority should remain in effect until terminated by written notice to the parties to the agreement thirty days prior to the notification date provided therein.

Article 1.01 of the labor agreement (Exhibit 19) provided that the agreement should remain in effect until May 31, 1973, and from year to year thereafter unless changed or terminated as provided in the agreement, and

Article 1.03 of the agreement required a party desiring to terminate the agreement to notify the other party in writing at least ninety days prior to June 1 of each year.

An Amendment to the agreement became effective June 1, 1973, and continued in effect until after the filing of the complaint on April 29, 1974. The agreement for the year ending June 1, 1973, enforced by the court, was by its terms "subject to amendment at any time by mutual consent of the parties hereto" (Article 1.05). The amendment which became effective for the year commencing June 1, 1973 (exhibit 20) was expressly adopted in pursuance of this authority and was expressly made applicable to the individual employers who had signed the letter of assent, Exhibit 1 (Preamble of exhibit 20, page 1).

The company never revoked the specific bargaining authority conferred upon Southern Colorado Chapter, NECA, by Exhibit 1, and never gave written notice of termination of the agreement to any party thereto.

Early in 1973, the company fell behind in its payment of checked off dues and fringe benefits to the union as provided in the agreement. The union made several demands upon the company to pay up its arrears, and when the payments had not been made, Robert Grinstead, the business manager of the local union, and Stanley Johnson, the assistant business agent, went to the Company offices (I—23-24). They spoke to Mr. Nicholas, the president of the Company, and Grinstead told him the only recourse the union had would be to remove the men for awhile until A-1 made its payments current. After Mr. Nicholas stated he could not make the payments, Grinstead told the workmen to come into the union hall and the union would try to get them other jobs "until A-1 Electric can get current. Then we can send you back, those of you wishing

to come back." (I—25). At no time was termination of the contract mentioned. Mr. Nicholas asked how he could get the same men back and Grinstead replied that any of the workmen that wanted to would certainly be allowed to go right back to work for him as soon as he made the payments and became current (I-26, 27). He stated that the workmen went to the union hall and were referred out temporarily to other employers so that they could work "while we were trying to correct the delinquencies." (I—26).

No payments under the agreement have been made by the company for any work performed since the month of March, 1973, but the company continued to engage in the electrical contracting business up to the time of the trial without employing any union employees and without requesting any referrals from the union, as provided in the agreement.

The case was tried to the court, which entered specific findings and conclusions, including the following:

> "Because of the defendant's breach, the Union refused any further performance under the contract on May 17, 1973. It has since refused all further performance of its obligations under the contract and that refusal is justified and excused.
>
> "The Union has not terminated the contract and its refusal of performance is neither an express termination nor a repudiation of the agreement." (II—20)

The trial court then held, however, that the only damages to be awarded to the union and the fund trustees were the payments which were in arrears on May 17, 1973

(Appendix B hereto, p.B-1). The trial court thereafter entered judgment for the amounts of these arrears, and interest (Appendix C hereto).

In the Court of Appeals, the union and the fund trustees did not challenge and they do not here challenge the findings of fact entered by the trial court, but they simply contended and here contend that the trial court erred as a matter of law in failing to give judgment in addition against the company for the dues and fringe payments which accrued under the collective bargaining agreement after May 17, 1973, the date the union withdrew its members from company employment and notified the company that union members would not be supplied for employment until the company paid up the arrears.

The Court of Appeals upheld the contention of the union and the fund trustees to the extent of allowing as damages the checked off dues and fringe payments accruing under the agreement until the end of the contract year in which the breach occurred, or May 31, 1973, an additional period of 2 weeks.

The union and the fund trustees contended below and contend here that damages should have been awarded for the contract year June 1, 1973 through May 31, 1974, since exhibit 20, the agreement for that year, was an authorized amendment to the prior agreement and was assented to by the company by reason of its failure to give written notice of termination of the agreement at least ninety days prior to June 1, 1973.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals decides an important question of federal law which has not been but should be settled by the Supreme Court, and the decision of the

Court of Appeals is in conflict with principles of federal labor law and with the national policy respecting labor relations as enunciated by this court and by other Courts of Appeals.

ARGUMENT

The effect of the decision of the trial court, and of the decision of the Court of Appeals with its slight modification of the appropriate damage period, is to deny to the union and the fund trustees a viable and effective remedy against the employer who simply decides he will no longer be bound by a collective bargaining agreement. The decisions have virtually served notice upon employers party to the agreement that they can sever the bargaining relationship at any time (or at the end of any contract year) without giving the required written notice of termination to anyone and become a nonunion employer without fear of any significant damage remedy. The trial court conceded that such, indeed, may be the result of its decision (Appendix B hereto, p.B-1). And the same result is apparent from the decision of the Court of Appeals which refused to give vitality to the notice requirements for terminating the agreement.

So holding, the lower courts in this case have failed to recognize and apply national labor policy respecting collective bargaining agreements.

The process of collective bargaining and the integrity of collective bargaining agreements stand at the very core of the federal labor laws. In *Textile Workers Union v. Lincoln Mills,* 353 US 448, 1 L.Ed2 972, 77 S.Ct. 912 (1957), this Court reviewed the legislative history of section 301 of the Labor Management Relations Act pointing out that the Senate Report summed up the philosophy of section 301 as follows:

> " 'Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.' " (353 US 454)

and that the Report stressed the fact that collective bargaining agreements were made " 'equally binding and enforceable on both parties' " (353 US 454).

To the same effect are the principles which this Court employed in its decision in *Boys Markets Inc. v. Retail Clerks Union, Local 770*, 398 US 235, 26 L.Ed2d 199, 90 Sup. Ct. 1583.

The national labor policy is that collective bargaining agreements should be enforceable. Denial of the damages sought here tends to make the collective bargaining agreement unenforceable. What is worse, it opens a door for employers who are seeking an escape from collective bargaining agreements and tends to weaken, rather than reinforce, the sanctity and binding effect of such agreements. As Robert Grinstead, the business manager of the union testified, the delinquencies of employers under the collective bargaining agreement are worse than they were before, "because it's very obvious nothing has been done about the A-1 issue" (I-41), and they are not too impressed when he calls them up and tells them to get into compliance because they say, "why should I? A-1 didn't have to" (I-40).

The decisions of the lower courts in the present case are in conflict with the national policy in the field of labor relations in at least the following particulars:

a. They deny a remedy and damages to the Union for the Company's unilateral breach of the amended and continuing contract and virtual disruption of the bargaining relationship, in disregard of the notification provisions of the agreement.

b. They allow the employer to succeed, by breach of the agreement near the end of the contract year, in effectively terminating the collective bargaining relationship with the bargaining representative of the Company's employees.

c. Far from promoting the sanctity of collective bargaining agreements, the decisions have an exactly opposite effect.

d. They open the door for other employers to renounce their collective bargaining agreements near the expiration date without fear of being assessed any more than trifling damages for the breach, and in spite of specific contract requirements for advance notice of withdrawal of bargaining authority.

The collective bargaining agreement covers the whole employment relationship and the policy of the national labor laws is to encourage and perpetuate that relationship.

> *United Brotherhood of Carpenters and Joiners of America vs. Hensel Phelps Construction Company* (10th CA 1967) 376 F.2d 731, and cases cited therein (cert.den. 389 US 952, 88 S.Ct 333, 19 L.Ed.2d. 360).

As the Sixth Circuit remarked in *Bryant v. International Union, United Mine Workers of America* (6th CA 1972) 467 F.2d 1, cert. den. 410 U.S. 930, 93 S.Ct. 1370, 35 L.Ed.2d 592:

> "In examining these sections [of the contract] it must be remembered that the substantive law to be applied is federal in nature, derived from the policy of the national labor laws. See Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1957). So far as possible the courts must seek to advance, not retard those national labor policies in construing the collective bargaining agreements which come before them." (467 F.2d 4)

Finally, with respect to the policy of the national labor laws, Congress has given special importance to written notices of contract termination and specified a time period of sixty days following such notices during which time no party to the contract is permitted to terminate it. (Section 8(d) and 8(d) (1), National Labor Relations Act).

Petitioners do not cite this provision of the National Labor Relations Act to contend that the proper time period to apply for accrual of damages would be sixty days after a written notice of termination, irrespective of the term of the applicable contract, but the notice requirements of the National Labor Relations Act show the importance which Congress attached in the administration of labor relations to specific *written* notices of contract termination.

Petitioners contend that the relevant period for accrual of damages is at least the full contract year, June 1, 1973, to May 31, 1974, because notice requirements with respect to termination of collective bargaining agreements are important and are to be enforced according to their terms.

Cases decided by the Fourth and Tenth Circuits illustrate the importance of adhering to such notice requirements.

In the case of *Winston-Salem Printing Pressmen and Assistants' Union v. Piedmont Publishing Company* (4th CA 1968) 393 F.2d 221, the court was confronted with a collective bargaining agreement which contained an automatic renewal clause, with provision for opening upon notice given by either party. The court was faced with a Union contention that the employer was obliged to arbitrate new contract terms after the expiration of the contract year, and a Company contention that if courts enforce such an arbitration, there would never be an end to the contract. The court, however, enforced the order of the District Court compelling the parties to submit their differences over a new contract to arbitration, pointing out that the contract would surely end when both parties agreed to terminate it, or when a new bargaining representative might be designated by election, and stressing the importance in national labor policy of continuity of bargaining relationships. The court discussed the national labor policy embodied in §301 and pointed out that:

> "By empowering the courts to enforce collective bargaining agreements under section 301, Congress sought to 'promote a higher degree of responsibility upon the parties to such agreements, and * * * thereby promote industrial peace.' S. Rep. No. 105, 80th Cong., 1st Sess. 17. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960). Thus, it is clearly the policy of our national labor legislation to encourage both labor and management to negotiate contracts that will effectively regulate every aspect of their complex relationship." (393 F.2d 225, 226)

In the case of *M K & O Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motorcoach Employees of America* (10th CA

1963) 319 F.2d 488, cert.den. 375 US 944, 84 S.Ct 350, 11 L.Ed.2d 274, the court upheld the effectiveness of a timely notice of termination which was given by the Union, and made it very clear in the opinion that the provisions which the parties incorporate in their agreement respecting automatic renewal and change of the contract by amendment are to be enforced according to their terms. (319 F.2d 492).

We have dealt thus far with the federal labor policy which strongly favors the integrity and enforceability of collective bargaining agreements.

Traditional principles of contract law respecting damages for breach also demonstrate the error of the limited damage remedy which the lower courts have allowed in this case.

At this point, it is important to recognize the following features of this case:

a. The fringe benefits provided by the agreement, and vacation pay, as well as membership in the union, were available to all electrical workers employed by the company after as well as before May 17, 1973. For example, R. F. Nicholas, the son of the company officers, never did join the union, but he was covered by the vacation allowance and other fringes and remitted union dues like the others.

b. Even though the union justifiably withdrew union members from company employment because of the company's breach, the union's duties continued with respect to the new nonunion employees of the company because the duty of the representation is statutory (sec. 9(a) of the Act, 29 USC 159(a)) and extends to all employees in the collective bargaining unit whether they belong to the union or not. *Ford Motor Company v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

c. The contract involved had a standard union shop clause, and the only reason the employees were nonunion men after May 17, 1973, was that the employer breached his contract to require them to become members of the union after the statutory waiting period (Article 3.15, exhibit 19). The union is entitled to its dues, in particular, not only when the men are menbers of the union, but as the damages sustained by the union when they are not.

In *New Park Mining Company v. United Steel Workers of America, Local 4264,* (CA 10th Cir. 1961) 288 F2d 225, the mining company had discontinued its mining operations at one of its mines and then promptly leased the mining premises to 69 of its 170 former employees. The collective bargaining agreement provided for a check-off of union dues. Suit was brought under section 301 of the Labor Management Relations Act by the union to recover the dues for the 69 lessees of the mine, and the court affirmed the trial court's award of union dues for the 69 men who continued to operate the mine under the leasing arrangement.

To the same effect are *United Shoe Workers of America Local 127 v. Brooks Shoe Mfg. Co.,* (CA 3rd Cir. 1962) 298 F2d 277, and *Burlesque Artists Ass'n. v. I. Hirst Enterprises.* (CA 3rd Cir. 1959) 267 F2d 414.

Under the rule of the *New Park Mining, Burlesque Artists,* and *Brooks Shoe* cases, the union is entitled to the amount of dues which would have been checked off and paid to the union if the company had not breached its obligations under the collective bargaining agreement. The award is not an award of dues as such, but of damages in the amount which should have been paid to the union as dues.

The trial court cut off the accrual of damages on May 17, 1973, on the ground that to allow damages beyond that date "would be transforming a mutual, executory contract

with concurrent conditions of performance into a unilateral obligation."

The general law of contracts provides many instances in which "a mutual, executory contract with concurrent conditions of performance" is the basis for a judgment against the party breaching such contract, whose performance includes the payment of periodic specified and measurable sums of money, for *all* of the money accruing during the contract term, and not just the portion of the money which accrued before the innocent party declared breach and ceased his performance.

The landlord collects his rent for the entire term if the tenant abandons the premises and the landlord is unable to rent them.

Perhaps the closest simiiar case under the general law of contracts to the case here presented is the employment contract in which a store manager or business executive is employed for a specified period of years at a specified salary. The contract is undoubtedly a mutual executory contract with concurrent conditions of performance, but if the employer discharges the employee without justification before the contract has expired the measure of damages which the employee recovers is the unpaid balance of salary provided in the contract, subject again to his duty to mitigate the damage.

Taylor v. Tulsa Tribune Co., (CA 10th Cir. 1943) 136 F2d 981

The same rule is applied for the benefit of a school teacher hired for a specific term and wrongfully discharged before the end of the term.

School District v. Propes, 155 Colo. 40, 392 P2d 292 (1964)

Annotation: 22 ALR 3d 1047

In the case of *Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Co.*, (CA 10th Cir. 1964) 338 F2d 407, the action had been brought to enforce an order of the National Railroad Adjustment Board determining that the railroad had violated its collective bargaining agreement and granting an award to the employees of one day's full pay for each claim filed. The trial court awarded nominal damages only because the parties had stipulated that the aggrieved employees had suffered no actual monetary loss or hardship. The court of appeals, affirming the judgment of the trial court, stated:

> "We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned." (338 F2d 409-410)

Thus, the fact that the collective bargaining agreement here involved is a mutual executory contract with concurrent conditions of performance is no barrier at all to awarding the union and the fund trustees the specified measurable amounts of money which continued to accrue under the agreement as the company proceeded to carry on its business with nonunion men.

CONCLUSION

For all of the foregoing reasons this case involves important principles of federal law which have been decided incorrectly by the courts below, and contrary to

settled principles of federal labor law which form an important part of the national policy in labor relations. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 12, AFL-CIO; TRUSTEES OF ELECTRICAL INDUSTRY VACATION FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL BENEFIT FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL WORKERS PENSION TRUST; and TRUSTEES OF JOINT APPRENTICESHIP AND TRAINING FUND;

Plaintiffs-Appellants,

v.

A-1 ELECTRIC SERVICE, INC., a corporation,

Defendant-Appellee.

No. 75-1317
74-M-378)

Filed March 4, 1976
Howard K. Phillips, Clerk

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Submitted on the briefs.

Wayne D. Williams and Howard E. Erickson of Williams, Erickson & Wallace, Denver, Colorado, for Appellants.

William E. Kenworthy, Denver, Colorado, for Appellee.

Before LEWIS, Chief Judge; BARRETT and DOYLE, Circuit Judges.

LEWIS, Chief Judge.

This action, commenced in the district court for the District of Colorado pursuant to section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), seeks damages from A-1 Electric Service for its alleged breach of the collective bargaining agreement. The plaintiffs appeal from a favorable judgment below, alleging inadequacy in the amount of the awarded damages.

The present controversy surfaced in early 1973 when A-1 became delinquent in its payments to various funds due under the collective bargaining agreement. The agreement provided for a checkoff of union dues and payments into the vacation fund, benefit fund, pension trust fund, apprenticeship and training trust fund, and to the National Employees Benefit Board. After A-1 became several months in arrears on these payments, the union attempted by letter and telephone to encourage payment. On May 17, when A-1's compliance was not forthcoming, the union withdrew its members from A-1's employ and reassigned them to other jobs. Subsequently, A-1 hired nonunion electricians, violating the hiring hall and union shop provisions.

Following the outlined grievance procedures, the union filed a complaint with a joint conference committee

alleging noncompliance by A-1 with the agreement. The committee met in August 1973 and determined that A-1 was guilty of being delinquent on its payments to the various funds and guilty of violating the hiring hall provision of the agreement.

Remedy for the breach was then sought in district court. The district court found that A-1 was in breach of the agreement for failing to observe the union shop and hiring hall provisions and for having made no payments to the relevant funds for any month since March 1973. As damages, the plaintiffs contended that they were entitled to an amount equal to the arrearages in the various funds, computing from the time of the initial default until the complaint was filed or the time of trial. The district court disagreed, however, holding that since none of A-1's employees have belonged to the union since May 17—the time the union withdrew its members—there was no basis for dues checkoff or payment into the other funds. It is this conclusion that the plaintiffs challenge on appeal.

When, as here, an action is brought under section 301(a) of the Labor Management Relations Act (the Act) and the proper remedy is at issue, the starting point for any analysis should be Textile Workers v. Lincoln Mills, 353 U.S. 448. The Court in *Lincoln Mills* adopted the view that section 301(a) authorized "federal courts to fashion a body of federal law for the enforcement" of collective bargaining agreements covered by the Act. *Id.* at 451. Each remedy should be designed to effectuate the underlying policy of the Act. In the instant case, the lower court determined that the proper measure of damages for breach of the contract should be general contract law, citing Brotherhood of Railroad Trainmen v. Denver & R.G.W.R.R., 10 Cir., 338 F2 407, 409-10, *cert. denied,* 380 U.S. 972, as authority. We agree. However, we question

whether in computing the damage award the district court correctly applied general contract law in an effort to effectuate the national labor policy of enforcing collective bargaining agreements.

While the district court was cognizant that A-1 had not only breached the agreement for failure to make prompt payment of union dues and other funds prior to May 17, but had also disregarded the agreement by hiring nonunion personnel subsequent to May 17, it determined that the plaintiffs were not entitled to damages for the second breach because they had suffered no actual injury. The court found "no showing that the Union lost members or that there are fewer contractors assenting to the agreement." This conclusion is incorrect, mainly because it overlooks the facts that had A-1 complied with the union shop provisions and made the appropriate payments after May 17, each of the plaintiffs would have been in an improved economic position. A proper remedy in breach of contract suits is to place the plaintiffs in the position they would have attained had the contract been performed. Interstate United Corp. v. White, 10 Cir., 388 F2 5, 7. The district court failed to do so in this case.

In similar cases, courts have found that the appropriate measure of damages for the failure of an employer to hire union members when it was contractually required to do so was the amount that should have been paid into union dues and other funds had the agreement been honored. Bangor & A.R.R. v. Brotherhood of Loc. Fire. & Eng., D.C. Cir., 442 F2 812, 822; Burlesque Artists Ass'n v. I. Hirst Enterprises, 3 Cir., 267 F2 414, 417. *See also* United Shoe Workers, Local 127 v. Brooks Shoe Mfg. Co., 3 Cir., 298 F2 277, 280-82; New Park Mining Co. v. Steelworkers, Local 4264, 10 Cir., 288 F2 225, 228. In *Burlesque Artists,* also brought pursuant to section 301(a), the defendant's theaters had breached an agreement requiring persons

appearing in the theaters to become members of the plaintiff's association. In measuring the damages suffered by the association due to the theaters' failure to insist that their performers join the association, the court allowed "estimates of what the take to Burlesque Artists would have been had all the persons required to join that organization joined it and paid." Burlesque Artists Ass'n v. I. Hirst Enterprises, *supra*, at 417. Although *Bangor & A.R.R.* was not brought pursuant to the Labor Management Relations Act, its facts and holding are sufficiently analogous to support our determination. Damages were sought for the failure of the railroad company to place firemen on trains operating in full crew states in accordance with the collective bargaining agreement. The court allowed recovery

> of the damage sustained by the Brotherhood as a result of these violations in the loss of the dues, assessments, initiation fees, and other payments which would have been made to [the union] if additional firemen had been employed on the illegally blanked runs.

Bangor & A.R.R. v. Brotherhood of Loc. Fire. & Eng., *supra,* at 822.

As in these cases, we conclude that the appropriate measure of damages resulting from A-1's disregard of the hiring hall and union shop provisions is to assess damages in the amount that it would have paid had it abided by the agreement. To do so also comports with the power of the federal courts under section 301(a) to fashion a remedy that encourages the enforcement of collective bargaining agreements.

A problem arises, however, in fixing the proper time period for measuring these damages. To award damages

only for the amounts owed to the union as of May 17 as suggested by the trial court would tend to weaken the enforceability of collective bargaining agreements and allow the breaching party to disregard the agreement and suffer only a minimal penalty. Equally unworkable is the suggestion by the union that the cutoff date for the damages should be either at the filing of the complaint or at the time of the trial. The filing of the complaint, and indirectly the time of the trial, are somewhat controlled by the plaintiff. To use either as a cutoff point for the assessment of damages would be to encourage some plaintiffs to postpone the filing of their complaint until the last possible moment within the applicable statute of limitations in order to increase the amount of damages.

A more reasonable cutoff date for the damages would be the end of the contractual year, in this case May 31, 1973. This is in accord with the general rule in breach of contract cases that the defendant is liable for all damages resulting from the breach that could have been reasonably and fairly contemplated by the parties at the time of execution. United Shoe Workers, Local 127 v. Brooks Shoe Mfg. Co., 3 Cir., 298 F2 277, 281-82; *Restatement of Contracts* § 330. It was foreseeable in the instant case that if the collective bargaining agreement were breached, that damages would accrue for at least the remainder of the contractual period.

One further problem exists, however, as regards this specific collective bargaining agreement since there was not a definite expiration date. By assenting to the collective bargaining agreement for June 1, 1972, to May 31, 1973, A-1 assented to the automatic renewal of the agreement from year to year thereafter unless it terminated the agreement by giving written notice 90 days prior to the commencement of the new contractual year. In this case, A-1 did not terminate the agreement by written notice.

However, in spite of A-1's noncompliance with the termination provision, it is appropriate to limit the damages to the end of the contractual year in which the breach occurred—May 31, 1973—since A-1's intent to terminate the agreement was adequately manifest by its noncompliance.

A-1 contends that the union and the trustees of the unpaid funds have no standing to recover dues and other payments on behalf of those nonunion personnel employed by it subsequent to May 17. The union suffered an actual, immediate injury when A-1 disregarded the union shop provisions, therefore it had standing to sue for that injury. As to the nonpayment into the other funds, the standing argument is refuted simply by noting that the bargaining representative's duty of representation extends to all employees in a collective bargaining unit, not merely to union members. Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38. Since provisions of the agreement applied to all the employees of each of the signatories, the union and the trustees were properly before the district court in attempting to enforce these provisions on behalf of the nonunion employees.

We deny the plaintiffs' claim of attorney's fees. The Supreme Court has recently clarified the appropriateness of attorney's fees in certain types of litigation, holding that generally, the only recoverable attorney's costs will be in areas where Congress has specifically provided for attorney's fees. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240. Such is not the case here, therefore, we decline to award attorney's fees.

In sum, the district court erred in refusing to grant damages for the period of time following May 17. We reverse and remand the damage award for a computation

in accord with the holding herein, including interest on and after the date of the district court's original entry of judgment.

Affirmed in part, reversed in part, and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 12, AFL-CIO, et al,

Plaintiffs,

vs.

A-1 ELECTRIC SERVICE, INC., a corporation,

Defendant.

CIVIL ACTION NO. 74-M-378

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Williams, Erickson & Wallace, by Wayne D. Williams and Howard E. Erickson, 1110 Capitol Life Center, Denver, Colorado, attorneys for Plaintiff; William E. Kenworthy, 1810 Security Life Building, Denver, Colorado, attorney for Defendant.

On June 1, 1972, Local Union No. 12, International Brotherhood of Electrical Workers, AFL-CIO, entered in an agreement with Southern Colorado Chapter, National Electrical Contractors Association, as collective bargaining agent for contractors giving their written assent, covering working conditions in the electrical industry in Southern Colorado for the period of June 1, 1972 until June 1, 1973, and from year to year thereafter.

A-1 Electric Service, Inc., a corporation doing business in Pueblo, Colorado, gave written assent to be bound by that agreement, effective April 10, 1972. That written assent authorized Southern Colorado Chapter, NECA, to continue to be collective bargaining representative for the assenting employer until terminated by written notice.

The collective bargaining agreement provided for a union shop and a hiring hall whereby Local 12 became the sole and exclusive source of referrals of applicants for employment by the contractors. The agreement also required the check-off of union dues by the employer and it provided for a series of fringe benefit and fund payments.

Section 9.01 of the contract called for establishment of an Electrical Industry Vacation Fund and required all employers to deduct and remit as a vacation allowance, thirty cents per hour worked by all employees in the bargaining unit, excepting apprentices for whom the deduction was twenty cents per hour. An amendment of June 1, 1973 changed that deduction to six percent (6%) of the gross wages. The employers made no contribution to this fund. The amounts deducted were to be deposited in individual checking accounts for each employee who could withdraw only upon the basis of a joint authorization from the Union and employer. Section 9.17 of the agreement provided that the failure of an employer to comply with the vacation fund provision shall subject the employer to having his agreement terminated upon 72 hours notice in writing served by the Union.

Section 9.19 of the agreement provided for establishment of the Eighth District Electrical Benefit Fund and obligated each employer to pay thirty two cents per hour for each hour worked by each employee covered under this agreement to that fund.

Section 9.22 of the contract required each employer to pay twenty five cents per hour for each hour worked by each employee covered by the agreement to a pension trust known as the Eighth District Electrical Workers Pension Trust.

It was also provided that employers failing to make the pension trust payments shall be subject to having the agreement terminated upon seventy two hours written notice served by the Union.

Section 10.13 of the agreement required employers to contribute one-tenth of one percent of the gross monthly labor payroll to maintain and support an apprenticeship and training program provided for in the agreement.

The agreement also provided for payment to the National Employees Benefit Board one percent of the employers gross monthly labor payroll and in Section 3.23 it was provided that the failure to make remittance of that payment shall make the employer subject to having the agreement terminated upon seventy two hours notice in writing served by the Union and it also provided that the failure of an individual employer to comply with the provisions of the National Employees Benefit agreement shall constitute a breach of the labor agreement.

There were thirty electrical contractors who had given assent to be bound by the collective bargaining agreement in 1972.

The defendant A-1 Electric Service, Inc. employed from 8 to 10 electrical workers in 1972. Richard L. Nicholas has been the President of the company and his son, Richard F. Nicholas, was an employee. The wife of Richard L. Nicholas has been the bookkeeper and treasurer of the corporation.

The defendant complied with all of the contract terms through 1972. In 1973, it began to be late in making payments to the various funds. That delinquency became a concern of the Union representatives who contacted Mr. Nicholas to ask him to come into compliance.

Under date of March 21, 1973, the business manager of the Union wrote to the defendant concerning this delinquency and said:

> "Due to the very demanding restraints placed upon me by our International and the National Electric Benefit Fund, you have left me no choice but to invoke Article 3, Section 3.23 of the Agreement between your firm and our Local Union and remove the men if the delinquency is not paid by March 30, 1973."

Under date of March 29, 1973, the assistant business manager of the Union wrote a letter advising because of the circumstances explained by the defendant, the provisions of Article 3, Section 3.23 would not be invoked providing satisfactory payment was received by April 10, 1973.

Under date of May 7, 1973, the business manager of the Union again wrote about this delinquency and repeated the above quoted paragraph, excepting the demand date was changed to May 15, 1973.

The required payments had not been made by May 17, 1973. On that day the business manager and assistant business manager of the Union went to the headquarters of the defendant corporation before the beginning of the work day and asked Mr. Nicholas for payment. Mr. Nicholas advised that the defendant corporation did not

have the funds to make payment. The Union representatives then assembled the defendant's employees, advised them of the delinquency and told the men to report to the Union hiring hall for other job assignments.

Ever since May 17, 1973, the defendant has failed to abide by the Union shop and hiring hall provisions of the collective bargaining agreement and no payments to the various funds have been made for any months subsequent to March, 1973. There have been no union employees working for A-1 Electric Service, Inc. since May 17, 1973.

In August, 1973, the defendant was advised of a joint conference committee meeting to be held on August 21, 1973, to hear the local union complaint of non-compliance with the contract. The joint conference committee, composed of members of the NECA and of the Union, was established by the collective bargaining agreement to act as an arbitration unit. No representative of the defendant appeared before the committee and the result o 'he hearing was a determination that the defendant was guilty of violating the hiring hall provision of the agreement.

At the time of the trial of this action, thirty three contractors are in assent to the collective bargaining agreement.

CONCLUSIONS OF LAW

This Court has jurisdiction of this action under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a).

The defendant became bound by the provisions of the collective bargaining agreement on April 10, 1972.

On May 17, 1973, the defendant was in substantial and material breach of that agreement by the failure to make the payments to the funds as required by that agreement.

The obligations of the employer under the collective bargaining agreement are not divisible or separable. They are integral and related to each other.

The obligations of the employer and of the union are mutual and are to be performed concurrently. Accordingly, the breach of the contract by one party constitutes an excuse for any further performance by the other party.

Because of the defendant's breach, the Union refused any further performance under the contract on May 17, 1973. It has since refused all further performance of its obligations under the contract and that refusal is justified and excused.

The Union has not terminated the contract and its refusal of performance is neither an express termination nor a repudiation of the agreement.

The defendant has continued in default of the agreement.

The determination of the question of damages for this breach of contract is to be made on the basis of a general law of contract. *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co.* 338 F. 2d 407 (10 Cir. 1964). There is no provision in the agreement for liquidated damages.

The Union's claim for general damages has not been proven. While there was testimony that union members have expressed alarm and concern for the failure to enforce the agreement, there is no showing that the Union

lost members or that there are fewer contractors assenting to the agreement. Indeed, the evidence is to the contrary.

The plaintiffs contend entitlement to payment of the funds on the basis of the payrolls from May 17, 1973 to the time of the complaint or the time of trial. It is urged that to deny such an award would essentially make the contract unenforceable and permit the defendant to breach it with impunity. While that may, indeed, be the result, it does not justify the applicability of such damages. Since May 17, 1973, the employees of the defendant have not been union men. There is, therefore, no basis for the check-off of dues for them and no justification for deducting vacation pay from their wages. To award those amounts would be more than what the agreement provides.

The Court is well aware and has a concern for the importance of collective bargaining agreements in maintaining working conditions in industry. That concern does not, however, provide a basis for constructing a damage remedy such as requested in this case. To allow the recovery claimed, the Court would be transforming a mutual, executory contract with concurrent conditions of performance into a unilateral obligation.

In sum, the defendant has breached the collective bargaining agreement and would be liable for consequential damages, but no such damages have been shown. The defendant is, of course, liable for all payments required of it prior to May 17, 1973, and for interest thereon at the statutory rate of six percent from the time each payment became due. The computation of that amount must be made before the entry of judgment. The plaintiffs should also be awarded nominal damages in the sum of $10.00.

Upon the foregoing, it is

ORDERED that within twenty days the parties shall submit agreed computations of the amounts to be entered in judgment pursuant to the foregoing Findings of Fact and Conclusions of Law. Upon the failure of the parties to agree upon such computations, the amount shall be settled upon further hearing as ordered by the Court.

Dated this 21st day of February, 1975.

s/Richard P. Matsch

RICHARD P. MATSCH
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLORADO

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 12, AFL-CIO;

TRUSTEES OF ELECTRICAL INDUSTRY VACATION FUND;

TRUSTEES OF EIGHTH DISTRICT ELECTRICAL BENEFIT FUND;

TRUSTEES OF EIGHTH DISTRICT ELECTRICAL WORKERS PENSION TRUST; and

TRUSTEES OF JOINT APPRENTICESHIP AND TRAINING TRUST FUND;

Plaintiffs,

vs.

A-1 ELECTRIC SERVICE, INC., a corporation,

Defendant.

Civil Action No. 74-378

JUDGMENT

Upon the Findings of Fact, Conclusions of Law, and Order heretofore entered by the court in this matter on February 21, 1975, computation of the amount of the judgment having been left to counsel to make, by agreement if possible, and counsel having agreed upon such computations, without waiver of any rights of objection to or appeal from said findings and conclusions or this judgment, and the court being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of the following parties plaintiff for the respective amounts hereinafter set forth, which include interest to the date of this judgment from the time the respective amounts became due as follows:

	Amount of Judgment
1. For International Brotherhood of Electrical Workers, Local No. 12, AFL-CIO, and against the defendant	$803.10
2. For Trustees of Electrical Industry Vacation Fund, and against defendant	$1,035.11
3. For Trustees of Eighth District Electrical Benefit Fund, and against defendant	936.45
4. For Trustees of Eighth District Electrical Workers Pension Trust, and against defendant	2,176.79
5. For Trustees of Joint Apprenticeship and Training Trust Fund, and against defendant	33.49

Judgment is hereby entered for costs of suit in favor of plaintiff International Brotherhood of Electrical Workers, Local No. 12, AFL-CIO, and against defendant.

DONE IN OPEN COURT this 14th day of March, 1975.

BY THE COURT:

s/Richard P. Matsch
District Judge

Approved as to form and
computation of amounts:

s/Wayne D. Williams
Attorney for plaintiffs

s/William P. Kenworthy
Attorney for defendant